

The Honorable John C. Coughenour

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON**

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs, and

PUYALLUP TRIBE OF INDIANS, *et al.*,

Plaintiff-Intervenors,

v.

ELECTRON HYDRO, LLC,

Defendant.

Case No. 2:20-cv-01746-JCC

UNITED STATES' MOTION  
FOR LEAVE TO FILE  
AMENDED COMPLAINT

NOTE ON MOTION CALENDAR:  
February 18, 2022

**UNITED STATES' MOTION FOR LEAVE TO FILE AMENDED COMPLAINT**

**I. INTRODUCTION**

Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, the United States of America (the "United States"), on behalf of the Administrator of the U.S. Environmental Protection Agency ("EPA"), respectfully moves for leave to file the attached Amended Complaint. The proposed Amended Complaint (1) adds Thom A. Fischer ("Mr. Fischer") as an individual defendant, (2) includes an additional claim for the unpermitted discharge of fill

MOTION FOR LEAVE TO FILE  
AMENDED COMPLAINT - 1  
Case No. 2:20-cv-01746-JCC

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(202) 305-0302

material under Section 404 of the Clean Water Act (“CWA”), 33 U.S.C. § 1344, and (3) adds factual allegations concerning the duration of violations of the State of Washington’s Construction Stormwater General Permit. Allowing the United States to file the Amended Complaint will advance Rule 15(a)’s underlying purpose of promoting judicial economy and decisions on the merits. The United States has conferred with counsel for Defendant Electron Hydro, LLC and Plaintiff-Intervenors. Defendant has not indicated its position on the motion as of the time of filing. Plaintiff-Intervenors do not oppose this motion.

## II. STATEMENT OF FACTS

On November 25, 2020, the United States filed its initial Complaint in this matter pursuant to Sections 309(b) and (d) of the CWA, 33 U.S.C. §§ 1319(b), (d), against Electron Hydro, LLC (“Electron”). The Complaint alleges that Electron violated Section 301(a) of the CWA, 33 U.S.C. § 1311(a), by discharging pollutants and fill material into waters of the United States and failing to comply with permits obtained under Sections 402 and 404 of the CWA, *id.* §§ 1342, 1344. These claims relate to: (1) Electron’s placement of waste artificial turf, which was not authorized under Electron’s relevant CWA permits, into the bypass channel it created in the Puyallup River during construction on its hydroelectric facility (“Facility”); (2) the discharge of waste artificial turf and its constituent crumb rubber into the Puyallup River; and (3) noncompliance with the State of Washington’s Construction Stormwater General Permit. The United States requested civil penalties and injunctive relief, including the restoration of the waters of the United States into which Electron discharged pollutants.

The proposed Amended Complaint:

1) Names Mr. Fischer as an individual defendant who is liable for the CWA violations;

2) Adds a claim that Defendants, including Mr. Fischer, discharged unpermitted rock, gravel, and/or other fill material into the Puyallup River, in violation of Section 404 of the CWA, 33 U.S.C. § 1344, in the fall of 2020; and

3) Alleges facts demonstrating that Defendants, including Mr. Fischer, violated the State of Washington's Construction Stormwater General Permit as early as 2018.

These additions to the Amended Complaint are based on information obtained from Electron's responses to the United States' discovery requests and Electron's responses to EPA's information requests sent pursuant to Section 308 of the CWA, 33 U.S.C. § 1318.

### III. LEGAL STANDARD

Federal Rules of Civil Procedure ("Fed. R. Civ. P.") Rule 15(a) governs motions to amend pleadings and states that "[a] party may amend its pleading . . . with the . . . court's leave." Fed. R. Civ. P. Rule 15(a)(2). The rule further provides that "[t]he court should freely give leave when justice so requires." *Id.* Courts interpret this standard liberally. The Ninth Circuit has held that Rule 15(a)(2) carries "a strong presumption in favor of granting leave to amend a complaint" and should be "applied with extreme liberality." *Microsoft Corp. v. Chatterjee*, No. C20-1800, 2021 WL 3288095, at \*1 (W.D. Wash. Aug. 2, 2021) (quoting *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051–52 (9th Cir. 2003)); *see also Sonoma Cnty. Ass'n of Retired Emps. v. Sonoma Cnty.*, 708 F.3d 1109, 1117 (9th Cir. 2013).

Courts may decline to allow amendment "only if there is strong evidence of undue delay, bad faith[,] or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party[,] . . . or futility of amendment." *Hennessey v. ICE Floe, LLC*, No. C20-0835, 2021 WL 322685, at \*1 (W.D. Wash. Feb. 1, 2021) (quoting *Sonoma Cnty.*, 708 F.3d at 1117). "[T]he consideration of



prejudice to the opposing party [] carries the greatest weight,” *Eminence Capital*, 316 F.3d at 1052, and the party opposing amendment “bears the burden of showing prejudice,” *id.* (quoting *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987)).

#### IV. ARGUMENT

Allowing the United States leave to amend would serve the interests of justice that Rule 15 contemplates. The Ninth Circuit has stated that the “underlying purpose of Rule 15 is to facilitate decision on the merits. . .” *United States v. Webb*, 655 F.2d 977, 979 (1981). Ensuring that each CWA claim stemming from Defendants’ violations at the Facility and all responsible parties are included in the adjudication of this case and adding specificity to the currently pleaded claims through amendment will promote resolution of the case on its merits. Moreover, none of the five factors for denying leave to amend — undue delay, bad faith, repeated failure to cure deficiencies, undue prejudice to the opposing party, and futility of amendment — applies here.

##### A. The motion for leave is timely.

Under the Court’s current Scheduling Order (*see* Dkt. # 42), the deadline to join additional parties is March 31, 2022. As the United States seeks to add Mr. Fischer prior to this deadline, which was agreed upon by the parties, there can be no contention of undue delay here. *See, e.g., Dold v. Snohomish Cty.*, No. 2:20-CV-00383-RAJ, 2021 WL 6125806, at \*1 (W.D. Wash. Dec. 28, 2021) (because plaintiffs filed motion to amend complaint prior to court deadline, their “motion was timely, and another one of the four factors — absence of undue delay — weigh[ed] in favor of amendment”). Furthermore, the United States has requested and received information from Electron since filing the initial Complaint. Through review of thousands of documents provided by Electron, the United States obtained information



1 demonstrating Mr. Fischer's control over and direct participation in the violations alleged in this  
2 case, found evidence supporting its additional claim that Defendants violated Section 404 of the  
3 CWA, and uncovered facts pertaining to Defendants' violation of Washington's Construction  
4 Stormwater General Permit. The United States did not obtain information until after the original  
5 Complaint was filed, and thus the basis for the Amended Complaint did not arise until receipt  
6 and review of Electron's document production and Electron's responses to EPA's information  
7 requests. Accordingly, there is no undue delay, and the motion to amend is timely.

8 **B. This motion is filed in good faith and without dilatory motive.**

9 There is no evidence of bad faith or dilatory motive in seeking to file this Amended  
10 Complaint. The United States does not seek leave to amend the Complaint for the purpose of  
11 delaying resolution of the case, as six months remain in fact discovery and there is thus ample  
12 time to conduct discovery on the United States' additional claim and on Mr. Fischer's role in the  
13 violations. Electron has not yet served discovery and will have time to conduct discovery to  
14 support any defenses. In addition, the United States has been prepared to add Mr. Fischer as a  
15 defendant since fall 2021 and informed Electron of this proposed Amended Complaint at that  
16 time. However, at the request of Electron, the United States delayed filing this Amended  
17 Complaint to determine if the case can be resolved through settlement. During this time, state  
18 criminal charges were filed against Electron and Mr. Fischer. *See* Dkt. # 48-1-4. As a result, the  
19 United States is now filing this Amended Complaint naming Mr. Fischer as a defendant so the  
20 Court is aware of all issues before it and to provide the Court a full understanding of the United  
21 States' claims prior to adjudicating Electron's recently filed motion to stay proceedings. *See* Dkt  
22 No. 46.  
23

**C. There is no repeated failure to cure deficiencies.**

This is the first time the United States has requested to amend its Complaint. Thus, there is no repeated failure to cure deficiencies.

**D. The Amended Complaint will not prejudice either Defendant.**

Granting the motion to amend the Complaint does not prejudice either Electron or Mr. Fischer. First, ample time remains to complete discovery. The United States has diligently sought information from Electron since the start of the discovery period, and had already planned to take depositions of fact witnesses and to serve other written discovery in the coming months. The fact discovery period ends on July 31, 2022, leaving ample time for the United States to conduct discovery on its Amended Complaint and for Defendants to respond and take their own discovery. *See Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001) (finding no prejudice in part because an amendment did not “delay proceedings”). Additionally, “the need to undertake additional discovery cannot be classified as prejudice so long as ample time remains . . . to complete that discovery.” *U.S. Bank, N.A. v. Glogowski L. Firm, PLLC*, No. C19-0074-JCC, 2019 WL 11770574, at \*3 (W.D. Wash. Dec. 4, 2019) (quoting *AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 960 (9th Cir. 2006)).

Second, the United States’ additional claim alleging violations of Sections 301 and 404 of the CWA, 33 U.S.C. §§ 1311, 1344, is already included in the related complaint filed by Plaintiff-Intervenors, Puget Soundkeeper Alliance and Communities for a Healthy Bay, which has been consolidated with the United States’ Complaint. *See Citizens for a Healthy Bay, et al. v. Electron Hydro LLC*, Case No. 3:21-cv-05171-JCC (W.D. Wash. Mar. 9, 2021) (ECF Dkt. No. 1, ¶ 74). Thus, Electron is already aware of this alleged violation, and should be prepared to respond to discovery regarding this claim and to defend against it. *See, e.g., Nelson v. Thurston*

Cty., No. C18-5184RSL, 2021 WL 2105302, at \*1 (W.D. Wash. May 25, 2021) (no surprise or unfairness in allowing plaintiff to assert claim when plaintiff pled state claim involving same types of injury and damage). In addition, adding Mr. Fischer as an individual defendant will not affect the course of discovery, as questions of control, operation, and ownership of the Facility are central to the United States' prima facie case. Furthermore, the specific factual allegations the United States seeks to add do not materially depart from the substance of the initial Complaint. *See Sonoma Cnty.*, 708 F.3d at 1118 (no prejudice because "the theory and the operative facts of the claim remain the same"); *Hurn v. Ret. Fund Tr. of Plumbing, Heating and Piping Indus. of S. Cal.*, 648 F.2d 1252, 1254 (9th Cir. 1981) (no prejudice because "[t]he operative facts remain the same"). Defendants will therefore not be unfairly prejudiced by the Amended Complaint.

**E. The Amended Complaint is not futile.**

The factor of "futility" applies "only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." *Puget Soundkeeper All. v. APM Terminals Tacoma LLC*, No. C17-5016 BHS, 2021 WL 2550583, at \*2 (W.D. Wash. June 22, 2021). The Amended Complaint alleges sufficient facts to show that Defendants are persons who discharged a pollutant into a water of the United States and failed to comply with CWA permits, and therefore adequately states a claim for relief.

**V. CONCLUSION**

For the foregoing reasons, the United States respectfully requests that the Court grant leave to file the Amended Complaint pursuant to Fed. R. Civ. P. 15(a).

RESPECTFULLY SUBMITTED this 1st day of February 2022.

s/ Helen Y. Li  
HELEN Y. LI



1 Trial Attorney (CT Bar # 439117)  
2 Environmental Enforcement Section  
3 JOHN BRODERICK  
4 Trial Attorney (MA Bar # 688739)  
5 Environmental Enforcement Section  
6 SARAH BUCKLEY  
7 Trial Attorney (VA Bar # 87350)  
8 Environmental Defense Section  
9 Environment & Natural Resources Division  
10 U.S. Department of Justice  
11 P.O. Box 7611, Ben Franklin Station  
12 Washington D.C. 20044-7611  
13 (202) 305-0302  
14 john.broderick@usdoj.gov  
15 (202) 305-2945  
16 helen.li2@usdoj.gov  
17 (202) 616-7554  
18 sarah.buckley@usdoj.gov

19  
20 *Attorneys for Plaintiff United States of America*  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

I hereby certify that on February 1, 2022, I filed the foregoing UNITED STATES' MOTION FOR LEAVE TO FILE AMENDED COMPLAINT via the CM/ECF system, which will automatically send notice of such filing to all counsel of record herein.

DATED this 1st day of February 2022.

s/ Helen Y. Li

Helen Y. Li, CT Bar # 439117

The Honorable John C. Coughenour

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON**

\_\_\_\_\_  
UNITED STATES OF AMERICA, *et al.*,  
Plaintiffs, and  
PUYALLUP TRIBE OF INDIANS, *et al.*,  
Plaintiff-Intervenors,  
v.  
ELECTRON HYDRO, LLC,  
Defendant.  
\_\_\_\_\_

Case No. 2:20-cv-01746-JCC

[PROPOSED]  
ORDER GRANTING  
UNITED STATES' MOTION  
FOR LEAVE TO FILE  
AMENDED COMPLAINT

NOTE ON MOTION CALENDAR:  
February 18, 2022

This Court, having duly considered the Motion by the United States of America for  
Leave to File an Amended Complaint, finds that good cause exists for such Motion, and hereby  
GRANTS leave to the United States of America to file its Amended Complaint.

SO ORDERED this \_\_\_\_ day of \_\_\_\_\_, 2022.

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

[PROPOSED] ORDER GRANTING LEAVE TO FILE  
AMENDED COMPLAINT - 1  
Case No. 2:20-cv-01746-JCC

U.S. Department of Justice  
P.O. Box 7611, Washington, DC 20044-7611  
(202) 305-0302

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1 Presented by:  
2 s/ Helen Y. Li  
3 HELEN Y. LI  
4 Trial Attorney (CT Bar # 439117)  
5 Environmental Enforcement Section  
6 JOHN BRODERICK  
7 Trial Attorney (MA Bar # 688739)  
8 Environmental Enforcement Section  
9 SARAH BUCKLEY  
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14 P.O. Box 7611, Ben Franklin Station  
15 Washington D.C. 20044-7611  
16 (202) 305-0302  
17 john.broderick@usdoj.gov  
18 (202) 305-2945  
19 helen.li2@usdoj.gov  
20 (202) 616-7554  
21 sarah.buckley@usdoj.gov  
22 Attorneys for Plaintiff United States of America  
23  
24  
25

26 Date: February 1, 2022

26 Respectfully submitted,  
27 By: /s Helen Y. Li  
28 Helen Y. Li, CT Bar # 439117  
29

**CERTIFICATE OF SERVICE**

I hereby certify that on February 1, 2022, I filed the foregoing PROPOSED ORDER via the CM/ECF system, which will automatically send notice of such filing to all counsel of record herein.

DATED this 1st day of February 2022.

s/ Helen Y. Li  
Helen Y. Li, CT Bar # 439117

1  
2 UNITED STATES DISTRICT COURT  
3 WESTERN DISTRICT OF WASHINGTON  
4

5  
6 UNITED STATES OF AMERICA,

7 Plaintiff,

8 v.

9 ELECTRON HYDRO, LLC, and

10 THOM A. FISCHER,

11 Defendants.  
12

Civil Action No. 2:20-cv-1746

AMENDED COMPLAINT

13 **AMENDED COMPLAINT**

14 The United States of America ("United States"), by authority of the Attorney General of the  
15 United States, acting at the request of the Administrator of the United States Environmental  
16 Protection Agency ("EPA"), files this Complaint and alleges as follows:

17 **NATURE OF THE ACTION**

18 1. This is a civil action brought pursuant to Sections 309(b) and (d) of the Clean  
19 Water Act ("CWA"), 33 U.S.C. §§ 1319(b) and (d), to obtain injunctive relief and civil penalties  
20 against Electron Hydro, LLC, and Thom A. Fischer ("Defendants"), for the discharge of  
21 pollutants into waters of the United States without authorization and for violations of permits  
22 issued by the United States Army Corps of Engineers ("Corps") and the State of Washington.

23 2. Defendants own and/or operate a hydroelectric facility located on the Puyallup

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1 River in Pierce County, Washington. In July 2020, Defendants commenced work on an in-water  
 2 construction project involving reconstruction and repair of the facility's diversion dam structure  
 3 and spillway.

4 3. During the construction project, Defendant employees and/or contractors of  
 5 Electron Hydro, under the supervision and direction of Thom A. Fischer, created a bypass  
 6 channel within a portion of the Puyallup River and, in violation of applicable permits, lined the  
 7 channel with waste field turf – composed, in part, of plastic yarn and crumb rubber – obtained  
 8 from a nearby disposal area. Defendant employees and/or contractors of Electron Hydro, under  
 9 the supervision and direction of Thom A. Fischer, covered the waste field turf with plastic liner.  
 10 Shortly thereafter, Defendant employees and/or contractors of Electron Hydro, under the  
 11 supervision and direction of Thom A. Fischer, routed the Puyallup River into the channel and the  
 12 plastic liner tore, releasing at least six hundred square yards of waste field turf and at least four to  
 13 six cubic yards of crumb rubber into the Puyallup River. Additionally, in October 2020,  
 14 employees and/or contractors of Electron Hydro, under the supervision and direction of Thom A.  
 15 Fischer, placed thousands of cubic yards of unpermitted fill material into the Puyallup River.  
 16 The Puyallup River flows to Puget Sound and is home to several species of fish protected by the  
 17 Endangered Species Act and subject to treaty rights by the Puyallup Tribe.

18 4. In this action, the United States seeks to: (1) enjoin the unauthorized discharge of  
 19 pollutants to waters of the United States without a permit in violation of Section 301(a) of the  
 20 CWA, 33 U.S.C. § 1311(a); (2) require Defendants to comply with the requirements of the  
 21 CWA, its implementing regulations, and with the terms of applicable CWA Section 402 and  
 22 Section 404 permits; (3) require Defendants, at its their own expense and at the direction of EPA,  
 23 to restore and/or mitigate the damages caused by its their unlawful activities; and (4) require

Defendants to pay civil penalties as provided in Section 309(d) of the CWA, 33 U.S.C. § 1319(d), and Section 404 of the CWA, 33 U.S.C. § 1344.

### **JURISDICTION AND VENUE**

5. This Court has jurisdiction over the subject matter of this action and the parties pursuant to Sections 309(b) and (d) of the CWA, 33 U.S.C. §§ 1319(b) and (d), and pursuant to 28 U.S.C. §§ 1331, 1345, and 1355.

6. Venue is proper in the Western District of Washington pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391(b) and 1395, because the violations occurred in this district, and because ~~the Defendant resides and has its principal place of~~ Defendants conduct business in this District.

7. Authority to bring this civil action is vested in the Attorney General of the United States, pursuant to Section 506 of the CWA, 33 U.S.C. § 1366, and 28 U.S.C. §§ 516 and 519.

8. Notice of the commencement of this action has been given to the State of Washington as required by Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

### **DEFENDANTS**

9. Defendant Electron Hydro, LLC, is a limited liability company with its principal business office at 1800 James St. Suite 201, Bellingham, Washington 98225.

10. Defendant Thom A. Fischer is the Governor, Chief Operating Officer, and Manager of Electron Hydro, LLC.

11. Defendants are “persons” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

12. At all times relevant to the Complaint, Defendants owned, operated, or otherwise controlled the hydroelectric facility located on the Puyallup River in Pierce County, Washington

1 (the “Hydroelectric Facility” or the “Site”).

2 13. The Hydroelectric Facility is located within Section 03, Township 16N, Range  
3 06E, Latitude 46.90586N, Longitude 122.03954, at approximately river mile 41 through river  
4 mile 31 of the Puyallup River.

5 **STATUTORY AND REGULATORY BACKGROUND**

6 14. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the “discharge of any  
7 pollutant by any person” to navigable waters unless that discharge is authorized by a permit  
8 issued under Sections 402 or 404 of the CWA, 33 U.S.C. §§ 1342 and 1344.

9 15. Section 502(5) of the CWA, 33 U.S.C. § 1362(5), defines “person” to include,  
10 among other things, an “individual,” “corporation,” “partnership,” or “association.”

11 16. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines the term “discharge  
12 of a pollutant” to include “any addition of any pollutant to navigable waters from any point  
13 source.”

14 17. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines the term “pollutant” to  
15 include, among other things, solid waste, garbage, chemical wastes, wrecked or discarded  
16 equipment, rock, sand, dirt, and industrial, municipal, and agricultural waste discharged into  
17 water.

18 18. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines the term “point  
19 source” as “any discernible, confined and discrete conveyance, including, but not limited to, any  
20 pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, [or] rolling stock . . . from  
21 which pollutants may be discharged.”

22 19. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines the term “navigable  
23 waters” as “waters of the United States, including the territorial seas.” In turn, “waters of the



United States” has been defined to include, among other things, waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide.” 40 C.F.R. § 120.2 (2020); 33 C.F.R. § 328.3(a)(1), (2).

20. Tributary, in turn, means a river, stream, or similar naturally occurring surface water channel that contributes surface water to a water described in Paragraph 18 above in a typical year. A tributary must be perennial or intermittent in a typical year. The alteration or relocation of a tributary does not modify its jurisdictional status. The term tributary includes a ditch that either relocates a tributary or is constructed in a tributary. 40 C.F.R. §§ 120.2 (2020).

21. Section 402(a) of the CWA, 33 U.S.C. § 1342(a), provides that EPA may issue National Pollutant Discharge Elimination System (“NPDES”) permits that authorize the discharge of any pollutant to navigable waters, but only in compliance with Section 301 of the CWA, 33 U.S.C. § 1311, and such terms and conditions as EPA determines are necessary to carry out the provisions of the CWA.

22. Section 402(p)(2)(B) of the CWA, 33 U.S.C. § 1342(p)(2)(B), requires an NPDES permit for storm water discharges associated with industrial activity.

23. Pursuant to Section 402(b) of the CWA, 33 U.S.C. § 1342(b), EPA may designate a state as the permitting authority for NPDES permits. The State of Washington, through the State of Washington Department of Ecology (“Ecology”), is an authorized permitting authority.

24. Under Sections 308 and 402 of the CWA, 33 U.S.C. §§ 1318 and 1342, EPA promulgated regulations relating to the control of storm water discharges at 40 C.F.R. § 122.26. Pursuant to 40 C.F.R. § 123.25, any state-authorized permitting authority must include such requirements in its NPDES permitting program.

1           25. Pursuant to 40 C.F.R. § 122.28, EPA may issue individual permits for a facility or  
2 general permits covering one or more categories of storm water discharges. Pursuant to 40  
3 C.F.R. § 123.25, any authorized state permitting program may include provisions for general  
4 permits.

5           26. 40 C.F.R. §§ 122.21(a), 122.26(c), 122.28, and 123.25 require that any person  
6 who discharges or who proposes to discharge storm water associated with industrial activity or  
7 small construction activity must apply for an individual permit or seek coverage under a  
8 promulgated storm water general permit.

9           27. Pursuant to Section 402(i) of the CWA, 33 U.S.C. § 1342(i), if a state NPDES  
10 program is approved pursuant to Section 402(b) of the CWA, 33 U.S.C. § 1342(b), the  
11 Administrator of the EPA retains the authority to take enforcement action under Section 309 of  
12 the CWA, 33 U.S.C. § 1319.

13           28. Section 404(a) of the CWA, 33 U.S.C. § 1344(a), authorizes the Secretary of the  
14 Army, acting through the Chief of Engineers of the Corps, to issue permits for the discharge of  
15 dredged and/or fill material into navigable waters at specified disposal sites.

16           29. “Fill material” is defined as “any pollutant which replaces portions of the waters  
17 of the United States with dry land or which changes elevation of a water body for any purpose.”  
18 40 C.F.R. § 232.2.

19           30. Section 404(e) of the CWA, 33 U.S.C. § 1344(e), authorizes the Corps to issue  
20 the permits referenced above on a state, regional, or nationwide basis for certain categories of  
21 activities involving discharges of dredged and/or fill material.

22           31. Once issued or authorized, CWA Section 404 permits have the force of law.

23           32. Pursuant to Section 404(n) of the CWA, 33 U.S.C. § 1344(n), the Administrator

1 of the EPA retains the authority to take enforcement action under Section 309 of the CWA, 33  
 2 U.S.C. § 1319, for CWA violations.

3 33. Section 309(b) of the CWA, 33 U.S.C. § 1319(b), authorizes civil actions for  
 4 “appropriate relief, including a permanent or temporary injunction” in the case of violations of  
 5 Section 301 of the CWA, 33 U.S.C. § 1311, violations of any condition or limitation set forth in  
 6 an NPDES permit issued under Section 402 of the CWA, 33 U.S.C. § 1342, or violations of any  
 7 permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, and grants jurisdiction to  
 8 district courts to restrain such violations and to require compliance.

9 34. Section 309(d) of the CWA, 33 U.S.C. § 1319(d), together with the Federal Civil  
 10 Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement  
 11 Act of 1996, 28 U.S.C. § 2461, and 40 C.F.R. Part 19.4, provide for civil penalties of up to  
 12 \$55,800 per day for each violation that occurred after November 2, 2015 and is assessed after  
 13 January 13, 2020, for violations of Section 301 of the CWA, 33 U.S.C. § 1311, or violations of  
 14 any condition or limitation set forth in an NPDES permit issued under Section 402 of the CWA,  
 15 33 U.S.C. § 1342.

16 35. Section 404(s)(4) of the CWA, 33 U.S.C. § 1344(s)(4), together with the Federal  
 17 Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection  
 18 Improvement Act of 1996, 28 U.S.C. § 2461, and 33 C.F.R. Part 326.6, provide for civil  
 19 penalties of up to \$55,801 per day for each violation that occurred after November 2, 2015 and is  
 20 assessed after June 8, 2020.

21 36. Liability for violations of the CWA is strict.

## 22 **GENERAL ALLEGATIONS**

### 23 A. The Site

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37. The Hydroelectric Facility includes a wooden flow diversion structure, a spillway, a water intake, and a 10-mile long flume that conveys diverted water to the powerhouse for electricity generation.

38. Defendants planned and proposed the Electron Hydro Diversion Repair and Spillway Replacement Project (“the Project”), which includes construction to repair the wooden diversion structure, replace the spillway, and reinforce existing shoreline protection infrastructure at the Site.

B. Applicable Permits

39. Defendants applied for and received permits under Sections 402 and 404 of the CWA, 33 U.S.C. §§ 1342 and 1344 in order to conduct the Project.

i. *Section 404 Permits*

40. On March 31, 2017, Defendants submitted a preconstruction notice and request to the Corps, Seattle District, seeking verification that the Project qualified for Clean Water Act Section 404 permit coverage for maintenance of the existing hydroelectric structure and bank stabilization. The submission described the Project and Defendants’ plan for construction. The submission stated Defendant that, in addition to shoreline protection work, Electron Hydro would exclude fish from the work site and, construct a cofferdam to isolate river flows, and create a bypass channel on the right bank of the Puyallup River to re-route the river flow from the work area where the diversion structure and spillway, and shoreline protection work would take place.

41. Thom A. Fischer was listed as the applicant for the Section 404 verification request. Thom A. Fischer signed as the applicant and certified that he had the authority to carry out the proposed activities. Thom A. Fischer further signed on behalf of Electron Hydro as the



1 property owner, identifying himself as the manager of Electron Hydro.

2 42. On August 8, 2018, the Corps provided a verification letter, addressed to Thom A.  
3 Fischer, authorizing proposed work, as described in Defendants' proposal and drawings dated  
4 March 28, 2017, under Nationwide Permit 3 (Maintenance) and 13 (Bank Stabilization), subject  
5 to certain special conditions.

6 43. Nationwide Permit 3 ("NWP 3"), subsection (a), generally authorizes the repair,  
7 rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill,  
8 provided that the structure or fill is not put to a different use. 82 Fed. Reg. 1860, 1984 (2017).  
9 Subsection (c) of Nationwide Permit 3 generally authorizes certain temporary structures, fills,  
10 and other work necessary to conduct the maintenance activity. *Id.* The temporary fills must  
11 "consist of materials, and be placed in a manner, that will not be eroded by expected high flows."  
12 *Id.* The temporary fills must be removed in their entirety and the affected areas returned to their  
13 pre-construction elevations and be revegetated after construction. *Id.*

14 44. Nationwide Permit 13 ("NWP 13") generally authorizes bank stabilization  
15 activities necessary for erosion control or prevention, provided the activity meets specified  
16 criteria. 82 Fed. Reg. at 1986. Those criteria include a requirement that "[n]o material is placed  
17 in a manner that will be eroded by normal or expected high flows" and that "[t]he activity must  
18 be properly maintained, which may require repairing it after severe storms or erosion events."  
19 *Id.* NWP 13 further authorizes temporary structures, fills, and work, including the use of  
20 temporary mats, necessary to construct the bank stabilization activity. *Id.* It also provides that  
21 "[t]emporary fills must consist of materials, and be placed in a manner, that will not be eroded by  
22 expected high flows." *Id.*

23 45. For activities authorized by NWP 13 that (1) involve discharges into special

1 aquatic sites, (2) are in excess of 500 feet in length, or (3) will involve the discharge of greater  
 2 than an average of one cubic yard per running foot as measured along the length of the treated  
 3 bank, below the plane of the ordinary high water mark or the high tide line, the prospective  
 4 permittee must submit a pre-construction notification to the appropriate Corps district engineer  
 5 prior to commencing the activity.

6 46. For work to be valid under a nationwide permit authorization, including  
 7 Nationwide Permits 3 and 13, a permittee must comply with the general conditions set out at 82  
 8 Fed. Reg. 1860, 1998–2003. Those general conditions include National General Condition 6  
 9 (Suitable Material), which states: “No activity may use unsuitable material (e.g. trash, debris, car  
 10 parts, asphalt, etc.). Material used for construction or discharged must be free from toxic  
 11 pollutants in toxic amounts.” 82 Fed. Reg. at 1998–99.

12 47. Where required by the terms of a nationwide permit, a prospective permittee must  
 13 notify the relevant Corps district engineer by submitting a pre-construction notification. 82 Fed.  
 14 Reg. at 2003. In such a case, the prospective permittee may not begin the proposed activity until  
 15 it is notified in writing that the activity may proceed under the relevant nationwide permit with  
 16 any special conditions imposed by the district or division engineer, or until other conditions set  
 17 out in General Condition 32(a)(2) are met. *Id.*

18 *ii. Section 402 Permit*

19 48. On November 18, 2015, Ecology issued the State of Washington’s NPDES and  
 20 State Waste Discharge General Permit for storm water discharges associated with construction  
 21 activity (“Construction Stormwater General Permit” or “CSWGP”), effective through December  
 22 31, 2020.

23 49. ~~Defendant applied for~~ In 2018, Defendants submitted a Notice of Intent seeking

1 coverage under the CSWGP.

2 50. Thom A. Fischer was listed as the Site Owner and was Permittee on the Notice of  
3 Intent.

4 51. In a letter addressed to Thom A. Fischer, Ecology granted permit coverage under  
5 the CSWGP effective July 5, 2018. The Site was permitted for 4.5 acres of disturbed area  
6 resulting from construction activity for the Project at the Site.

7 52. Thom A. Fischer was listed as the Operator/Permittee, the Property Owner, and  
8 the On-Site Contact Person in a subsequent modification form for CSWGP coverage.

9 53. Operator/Permittee is described on the modification form as the party with  
10 operational control over plans and specifications or day-to-day operational control of activities  
11 that ensure compliance with Stormwater Pollution Prevention Plan and permit conditions.

12 54. Thom A. Fischer signed the modification form as the manager of Electron Hydro.

13 55. The modification form required signature for a corporation by a responsible  
14 corporate officer.

15 56. The CSWGP sets forth Special and General Conditions with which permittees  
16 must comply, including among other things, requirements to:

17 a. submit a complete and accurate permit application to Ecology and submit a  
18 modification of coverage form for modifications such as changes to the  
19 area/acreage affected by construction activity (*See Condition S2*);

20 b. prepare and update a Stormwater Pollution Prevention Plan ("SWPPP") (*See*  
21 *Conditions S9.B and E*);

22 c. implement all appropriate Best Management Practices ("BMPs") (*See Conditions*  
23 *S9.B and D*);



- d. comply with monitoring requirements, including performing weekly site inspections and conducting monthly water quality monitoring (*See* Conditions S4.B, S5.B, S5.C, and S5.D);
- e. notify Ecology of planned physical alterations, modifications, or additions to permitted construction activity (*See* Condition G20); and
- f. notify Ecology of noncompliance when the permittee is unable to comply with any part of the terms and conditions of the permit, and the resulting noncompliance may cause a threat to human health or the environment, including discharges that violate water quality standards (*See* Condition S5.F).

C. Discharges

57. In July 2020, Defendants started in-water work on the Project. Plans for the 2020 construction season included creating a temporary cofferdam and bypass channel to divert the flow of the Puyallup River around the construction work area.

58. Between July 20 and 27, 2020, Defendant employees and/or contractors of Electron Hydro, under the supervision and direction of Thom A. Fischer, installed a temporary cofferdam.

59. The temporary cofferdam divided the Puyallup River, allowing Defendant to isolate the flow of the River to be isolated on either the right side (bypass channel) or left side (construction area) of the River in order to carry out construction activity.

60. The bypass channel was thus constructed in the Puyallup River by dividing the River's flow and temporarily relocating relocated the River to the channel along the River's right bank.

61. Defendants planned to install an impervious high-density polyethylene (HDPE)



1 plastic liner in a portion of the bypass channel.

2 62. Prior to installing the plastic liner, Defendants' personnel identified a risk that the  
3 liner could tear or otherwise be compromised by rock or debris. To address this risk,  
4 Defendants' personnel installed waste field turf underneath the plastic liner.

5 63. Defendant Employees and/or contractors of Electron Hydro, under the supervision  
6 and direction of Thom A. Fischer, obtained the waste field turf from a nearby quarry that serves  
7 as a dumpsite.

8 64. Defendant Employees and/or contractors of Electron Hydro, under the supervision  
9 and direction of Thom A. Fischer, used a crane to place the waste field turf in the bypass  
10 channel.

11 65. The use of waste field turf material was not authorized by the relevant permits,  
12 and Defendants did not inform any permitting authorities of its their decision to use the waste  
13 field turf in the bypass channel.

14 66. Defendant Employees and/or contractors of Electron Hydro, under the supervision  
15 and direction of Thom A. Fischer, placed approximately 2,409 square yards of waste field turf at  
16 the bottom of the bypass channel and installed the plastic liner over the waste field turf.

17 67. On July 28, 2020, Defendant Employees and/or contractors of Electron Hydro,  
18 under the supervision and direction of Thom A. Fischer, diverted the Puyallup River into the  
19 bypass channel.

20 68. A partial breach of the plastic liner occurred on or about July 29, 2020.

21 69. As a result of the partial breach of the plastic liner, Defendants discharged  
22 approximately 617 square yards of waste field turf material into the Puyallup River.

23 70. The waste field turf material consisted of a linear low-density polyethylene

1 (“LLDPE”) grass yarn matrix and a loose granular infill material composed of a mixture of  
2 graded silica sand and crumb rubber.

3 71. As a result of the partial breach of the plastic liner, Defendants discharged an  
4 estimated four to six cubic yards of crumb rubber into the Puyallup River.

5 72. Portions of the plastic liner and waste field turf matrix material were found in  
6 various locations throughout the Puyallup River, including at least 5,000 feet downstream of the  
7 construction site.

8 73. The crumb rubber rapidly and widely dispersed into the Puyallup River and has  
9 travelled at least 19 miles downstream.

10 74. The Puyallup River continued to flow through the bypass channel until on or  
11 about October 25, 2020. Portions of both the plastic liner and waste field turf remained in place  
12 in the bypass channel until on or about October 28, 2020.

13 75. Starting on or about October 19, 2020, Defendants used an excavator to construct  
14 a diversion rock spillway in the left side of the Puyallup River by discharging approximately  
15 6,000 cubic yards of rock, gravel, and/or other fill material.

16 76. The diversion rock spillway was not permitted under Section 404 of the CWA.

17 77. The rock, gravel, and/or other fill material used to create the diversion rock  
18 spillway has not been removed from the River.

19 78. The Puyallup River, including that portion of the River Defendants used as a  
20 bypass channel, flows year-round and contributes surface water flow to Commencement Bay and  
21 Puget Sound, which are traditional navigable waters.

22 D. Ecology CSWGP Violations

23 79. On August 11, 2020, after receiving an Environmental Report Tracking System

1 complaint regarding the discharge of waste field turf and crumb rubber, Ecology conducted an  
2 inspection of the Site. The inspector found that ~~Defendant~~ Electron Hydro violated the CSWGP  
3 because it:

- 4 a. failed to report the July 29 discharge of field turf and crumb rubber; and
- 5 b. failed to conduct monthly water quality sampling.

6 80. On August 17, 2020, Ecology conducted another inspection of the Site. The  
7 inspector found that ~~Defendant~~ Electron Hydro violated the CSWGP because it:

- 8 a. had disturbed more than the 4.5 acres authorized by the CSWGP;
- 9 b. failed to conduct and or keep records of weekly site inspections;
- 10 c. failed to stabilize exposed and unworked soil; and
- 11 d. failed to provide secondary containment for equipment containing fuel.

12 81. On September 30, 2020, Ecology conducted another inspection of the Site. The  
13 inspector found that ~~Defendant~~ Electron Hydro violated the CSWGP because it:

- 14 a. failed to adequately maintain its site log books;
- 15 b. failed to ensure its SWPPP was up-to-date and reflected all on-site BMPs;
- 16 c. failed to provide secondary containment for equipment containing fuel; and
- 17 d. failed to maintain and repair erosion and sediment control BMPs.

18 82. On November 4, 2020, EPA issued to Electron Hydro a request for information  
19 under Section 308 of the CWA, 33 U.S.C § 1318, requesting information related to Electron  
20 Hydro's compliance with the CSWGP since Electron Hydro received coverage in 2018.

21 83. Electron Hydro failed to provide documentation that it had maintained a site  
22 logbook or completed, and maintained records of, adequate site inspections since August 2018.

23 84. Thom A. Fischer had operational control over plans and specifications and day-to-



1 day operational control of activities that ensure compliance with SWPPP and permit conditions.

2 E. Thom A. Fischer

3 85. Thom A. Fischer was listed as the Applicant for Section 404 permit coverage.  
4 Thom A. Fischer identified himself as the manager of Electron Hydro for Section 404 permit  
5 coverage.

6 86. Thom A. Fischer was listed as the Site Owner and Permittee in applying for  
7 Section 402 permit coverage. Thom A. Fischer signed a subsequent modification form for  
8 Section 402 permit coverage as the manager of Electron Hydro and a responsible corporate  
9 officer.

10 87. At all times relevant to the Complaint, Thom A. Fischer acted as a manager and  
11 officer of Electron Hydro.

12 88. Thom A. Fischer managed, directed, or made decisions about environmental  
13 compliance and day-to-day operations related to the Site and the Project, including directly  
14 communicating with contractors and suppliers regarding design of the Project and financial costs  
15 associated with the Project.

16 89. Thom A. Fischer communicated with or directed communications with local,  
17 state, and federal agencies regarding environmental compliance, the discharges, and permit  
18 violations.

19 90. Upon information and belief, subject to a reasonable opportunity for further  
20 investigation and discovery, the decision to place the waste field turf in the bypass channel was  
21 made by Thom A. Fischer.

22 91. Following the discharges, Thom A. Fischer sent a letter to county, state, and  
23 federal regulators describing plans to stabilize the work site and remove waste field turf.



1           92.     Following the discharges, Thom A. Fischer sent a letter to county, state, and  
2     federal regulators, and the Puyallup Tribe of Indians, taking responsibility for the release of  
3     debris into the Puyallup River on behalf of the owners, the entire team at Electron Hydro, and  
4     himself personally.

5           93.     Upon information and belief, subject to a reasonable opportunity for further  
6     investigation and discovery, Thom A. Fischer was the ultimate decision-making authority related  
7     to the Site and the Project, including the decisions made at and with regard to the Site in the  
8     aftermath of the discharges.

9           94.     Upon information and belief, subject to a reasonable opportunity for further  
10    investigation and discovery, Thom A. Fischer had responsibility and authority either to prevent  
11    or to promptly correct the violations alleged in this Complaint, and failed to do so.

12          95.     Thom A. Fischer is a responsible corporate officer regarding the violations  
13    alleged in this Complaint.

14                               **FIRST CLAIM FOR RELIEF**

15    (Illegal Discharges of Waste Field Turf and Crumb Rubber into the Puyallup River in Violation  
16                               of Section 301(a) of the CWA, 33 U.S.C. § 1311(a))

17  
18          96.     Paragraphs 1 through ~~69~~ 95 are realleged and incorporated herein.

19          97.     At least on or about July 29, 2020, Defendants discharged waste field turf and its  
20    component crumb rubber from the bypass channel into waters of the United States.

21          98.     Upon information and belief, subject to a reasonable opportunity for future  
22    discovery, from on or about July 29, 2020 until on or about October 25, 2020, Defendants  
23    continued to discharge waste field turf and its component rubber crumb from the bypass channel  
24    into waters of the United States.

25          99.     The waste field turf and the component crumb rubber discharged from

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Defendants' bypass channel are pollutants, as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

100. The bypass channel is a point source as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

101. The Puyallup River is a "navigable water" within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and applicable regulations.

102. Defendants did not have a permit to discharge the waste field turf and component crumb rubber from the bypass channel into the Puyallup River.

103. Defendants violated Section 301 of the CWA, 33 U.S.C. § 1311(a) by discharging a pollutant from a point source into a navigable water.

104. Each day of each discharge referred to in Paragraphs ~~74~~ 97 and ~~72~~ 98 above constitutes a separate violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

105. Defendants are strictly liable to the United States for injunctive relief and civil penalties under Sections 309(b) and (d) of the CWA, 33 U.S.C. §§ 1319(b) and (d).

## **SECOND CLAIM FOR RELIEF**

(Illegal Discharges of Waste Field Turf into the Bypass Channel in Violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a))

106. Paragraphs 1 through ~~69~~ 95 are realleged and incorporated herein.

107. Upon information and belief, on or about July 20, 2020, Defendants and/or persons acting on ~~its~~ their behalf used a crane to place approximately 2,409 square yards of waste field turf into waters of the United States, specifically that portion of the Puyallup River being used as a bypass channel at the Site.

108. Defendants and/or persons acting on ~~its~~ their behalf obtained the waste field turf and component crumb rubber obtained from a nearby dumpsite.





118. Paragraphs 1 through 69 95 are realleged and incorporated herein.

119. Upon information and belief, on or about July 20, 2020, Defendants and/or persons acting on their behalf placed waste field turf and component crumb rubber into the bypass channel at the Site.

120. The waste field turf and component crumb rubber placed in the bypass channel are “trash,” which is an unsuitable material under General Condition 6 of Nationwide Permits 3 and 13. Waste field turf and component crumb rubber are is unsuitable for use in a river system where it can break down discharge loose component crumb rubber, and the waste field turf and component crumb rubber can potentially discharge toxins and other pollutants into the water.

121. The placement of unsuitable material into the bypass channel violates National General Condition 6 applicable to Nationwide Permits 3 and 13.

122. The placement of waste field turf and component crumb rubber in the bypass channel under a liner that could tear or otherwise be compromised by rock or debris constitutes the use or placement of materials that may be, and were, “eroded by expected high flows.”

123. The use or placement of materials in a temporary fill that will be “eroded by expected high flows” violates NWP 3 and 13.

124. Defendants have violated conditions or limitations of a permit issued by the Corps pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.

125. Defendants are strictly liable to the United States for injunctive relief and civil penalties under Sections 309(b) and (d) of the CWA, 33 U.S.C. §§ 1319(b) and (d).

**FOURTH CLAIM FOR RELIEF**  
(Failure to Comply with Section 402 Permit)

126. Paragraphs 1 through 69 95 are realleged and incorporated herein.



1           127. As stated above, Defendants failed to comply with the terms and conditions of the  
 2 applicable Construction Stormwater General Permit, including by: (1) failing to report  
 3 noncompliance; (2) failing to conduct monthly water quality sampling; (3) violating the allowed  
 4 disturbed acreage limit and failing to apply for a modification; (4) failing to conduct and  
 5 maintain a record of weekly site inspection reports; (5) failing to maintain site log books; (6)  
 6 failing to maintain the SWPPP; (7) failing to stabilize exposed and unworked soil; (8) failing to  
 7 provide secondary containment for equipment containing fuel; and (9) failing to maintain and  
 8 repair erosion and sediment control BMPs.

9           128. Defendants have violated ~~a condition~~ conditions or ~~limitation~~ limitations of a  
 10 permit issued by the State pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

11           129. Each day that Defendants failed to comply with each term and condition of the  
 12 Construction Stormwater General Permit referred to in Paragraph 404 127 above constitutes a  
 13 separate violation of Sections 301(a) and 402 of the CWA, 33 U.S.C. §§ 1311(a) and 1342.

14           130. Defendants are strictly liable to the United States for injunctive relief and civil  
 15 penalties under Sections 309(b) and (d) of the CWA, 33 U.S.C. §§ 1319(b) and (d).

#### 16 **FIFTH CLAIM FOR RELIEF**

17 (Illegal Discharges of Rock, Gravel, and/or Other Fill Material into the Puyallup River in  
 18 Violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a))  
 19

20           131. Paragraphs 1 through 95 are realleged and incorporated herein.

21           132. On or about October 19, 2020, Defendants or persons acting on their behalf used  
 22 an excavator to discharge rock, gravel, and/or other fill material into waters of the United States.

23           133. Upon information and belief, subject to a reasonable opportunity for future  
 24 discovery, Defendants discharged approximately 6,000 cubic yards of rock, gravel, and/or other  
 25 fill material into waters of the United States over the course of six days, starting on or about

1 October 19, 2020.

2 134. Defendants conducted, contracted for, supervised, directed, or otherwise caused  
3 the activities alleged in Paragraphs 132 and 133.

4 135. The rock, gravel, and/or other fill material are “fill material” under Section 404(a)  
5 of the CWA, 33 U.S.C. § 1344(a), as defined in 40 C.F.R. § 232.2.

6 136. The fill material that Defendants discharged constitutes “pollutants” as defined by  
7 Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

8 137. Defendants and/or persons acting on their behalf used an excavator to discharge  
9 the fill material. The excavator is a “point source” as defined by Section 502(14) of the CWA,  
10 33 U.S.C. § 1362(14).

11 138. The Puyallup River is a “navigable water” within the meaning of Section 502(7)  
12 of the CWA, 33 U.S.C. § 1362(7), and applicable regulations.

13 139. Defendants did not have a permit to discharge fill material into the Puyallup  
14 River.

15 140. Defendants violated Section 301 of the CWA, 33 U.S.C. § 1311(a) by discharging  
16 a pollutant from a point source into a navigable water.

17 141. Each day of each discharge referred to in Paragraphs 132 and 133 above  
18 constitutes a separate violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

19 142. The violations alleged in Paragraphs 132–141 continued on each and every day  
20 from the time the fill was placed until it is removed.

21 143. Defendants are strictly liable to the United States for injunctive relief and civil  
22 penalties under Sections 309(b) and (d) of the CWA, 33 U.S.C. §§ 1319(b) and (d).

23 **RELIEF SOUGHT**

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WHEREFORE, Plaintiff, the United States of America, respectfully requests that the Court grant the following relief:

1. Order Defendants to be assessed, pursuant to Section 309(d) of the CWA, 33 U.S.C. § 1319(d), civil penalties of up to \$55,800 per day for each violation of the CWA occurring after January 13, 2020.

2. Order Defendants to be assessed, pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, civil penalties of up to \$55,801 per day for each violation of the CWA occurring after June 8, 2020.

3. Order Defendants to take all appropriate action to remove all remaining fill material and any pollutants from the Puyallup River and to mitigate the effects of each of its their violations.

4. Order Defendants to comply with the requirements of the CWA, its implementing regulations, and with the terms of applicable CWA Section 402 and Section 404 permits.

5. Award the United States its costs in this action.

6. Grant such other relief as this Court may deem just and proper.

Respectfully submitted,

~~JONATHAN D. BRIGHTBILL~~ TODD KIM  
Principal Deputy Assistant Attorney General  
U.S. Department of Justice  
Environment & Natural Resources Division  
Washington, D.C. 20530-7611

/s John Broderick  
JOHN BRODERICK  
Trial Attorney (MA Bar # 688739)  
Environmental Enforcement Section  
HELEN Y. LI  
Trial Attorney (CT Bar # 439117)

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U.S. Department of Justice  
P.O. Box 7611, Washington DC 20044-7611  
(202) 305-0302



1 Environmental Enforcement Section  
2 SARAH BUCKLEY  
3 Trial Attorney (VA Bar # 87350)  
4 Environmental Defense Section  
5 Environment & Natural Resources Division  
6 U.S. Department of Justice  
7 P.O. Box 7611, Ben Franklin Station  
8 Washington D.C. 20044-7611  
9 (202) 305-0302  
10 john.broderick@usdoj.gov  
11 (202) 305-2945  
12 helen.li2@usdoj.gov  
13 (202) 616-7554  
14 sarah.buckley@usdoj.gov  
15

16 BRIAN T. MORAN  
17 United States Attorney  
18 Western District of Washington  
19

20 BRIAN C. KIPNIS  
21 Assistant United States Attorney  
22 Office of the United States Attorney  
23 Western District of Washington  
24 700 Stewart Street, Suite 5220  
25 Seattle, WA 98101-1271  
26 (206) 553-4426  
27 brian.kipnis@usdoj.gov  
28

29 CAITLIN SODEN  
30 Assistant Regional Counsel  
31 U.S. Environmental Protection Agency  
32 Region 10, Office of Regional Counsel  
33 1200 Sixth Avenue, Suite 155, M/S ORC-11-C07  
34 Seattle, Washington 98101-3140  
35 (206) 553-6635